STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

BODDY CONSTRUCTION COMPANY, INC.,

Plaintiff/Appellee,

v

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant/Appellant.

Michigan Supreme Court No:
Court of Appeals No. 237471
Court of Claims No. 00-17592-CM

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PLAINTIFF/APPELLEE'S RESPONSE IN OPPOSITION

TO THE DEFENDANT/APPELLANT'S

APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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COUNTER-STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF SOUGHT AS REQUIRED BY MCR 7.302(A)

Plaintiff/Appellee, Boddy Construction Company, Inc. ("Plaintiff"), agrees that the Defendant/Appellant, Michigan Department of Transportation ("Defendant"), is Seeking Leave to Appeal the February 28, 2003 Court of Appeals order which reversed a Court of Claims Opinion and Order granting the Defendant's Motion for Summary Disposition. The Court of Appeals Opinion dated February 28, 2003 also remanded this case to the Trial Court for further proceedings. (**Exhibit 1**) Specifically, the remand directs the Trial Court to determine whether the Plaintiff was entitled to additional compensation. While the Plaintiff agrees that the Defendant is Seeking Leave to Appeal the February 23, 2003 Order of the Court of Appeals, the Plaintiff states that the Defendant has failed to establish the requisite grounds for granting an Application for Leave to Appeal pursuant to MCR 7.302(B) with this Michigan Supreme Court. As a result, and for the reasons set forth in this Brief, the Plaintiff respectfully requests that this Honorable Michigan Supreme Court enter an Order denying the Defendant's Application for Leave to Appeal.

COUNTER – STATEMENT OF LACK OF GROUNDS FOR APPLICATION FOR LEAVE TO APPEAL PURSUANT TO MCR 7.302

Pursuant to MCR 7.302, an Application for Leave to Appeal to the Michigan Supreme Court must show the grounds for that Application or the Application **must** be denied.

> **"(B) Grounds.** The application must show that
>
> (1) the issue involves a substantial question as to the validity of a legislative act;
>
> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
>
> (3) the issue involves legal principles of major significance to the state's jurisprudence;
>
> (4) in an appeal before decision by the Court of Appeals,
>
> (a) delay in final adjudication is likely to cause substantial harm, or
>
> (b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid;
>
> (5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or
>
> (6) in an appeal from the Attorney Discipline Board, the decision is erroneous and will cause material injustice." (**MCR 7.302(B)**.) (**Exhibit 2**)

Here, the Defendant fails to demonstrate that any of these grounds exist to justify this Michigan Supreme Court granting the Defendant's Application for Leave to Appeal. The

Defendant is appealing to this Michigan Supreme Court an unpublished opinion per curiam of the Court of Appeals which has reversed the Trial Court's granting of the Defendant's Motion for Summary Disposition and remanded the matter to the Trial Court for further proceedings. None of the grounds for granting such an Application for Leave to Appeal exist in this current matter.

A. MCR 7.302(B)(1) Does Not Apply.

The Defendant's Application for Leave to Appeal fails to argue or show that the Defendant's Appeal involves a substantial question as to the validity of a legislative act. As a result MCR 7.302(B)(1) cannot serve as a basis for this Appeal. This Michigan Supreme Court must deny the Defendant's Application for Leave to Appeal.

B. MCR 7.302(B)(2) and (B)(3)Do Not Apply.

Where an issue has significant public interest - MCR 7.302(B)(2) - or where an issue involves legal principles of major significance - MCR 7.302(B)(3) - grounds for granting an Application for Leave to Appeal can exist. Defendant argues that the unpublished Opinion of the Court of Appeals is of significant public interest and involves legal principles of major significance. The Defendant is flatly wrong and the Defendant's argument in this regard is unsupported. **First**, the Opinion at issue is an unpublished decision and does not offer any binding precedent. **Second**, the Opinion at issue does not establish any form of a new landmark law. To the contrary, the Court of Appeals simply ruled that Defendants waived strict compliance of a notice provision. In order to support this ruling the Court of Appeals cited to a 1921 case from the Michigan Supreme Court, **Jacob** v **Cumings**, 213 Mich. 373; 182 NW 115 (1921).) The **Jacob** case stands for the proposition that parties may waive contractual requirements. Because the Court of Appeals is citing to a long standing

proposition dating back to 1921 involving waiver, there is no new rule of law being created by this unpublished Court of Appeals Opinion. The people of this State of Michigan have known for 82 years that contractual provisions can be waived.

Finally, Defendant argues that this Opinion of the Court of Appeals is of significant public interest because it somehow prevents the Defendant from being able to:

1. Evaluate future claims;
2. Work out settlements; and
3. Maintain records.

These concerns are unfounded. Nothing within the unpublished Opinion of the Court of Appeals will prevent the Defendant from evaluating future claims, working out settlements or maintaining records. The Defendant will be able to keep its records and enter into any settlement discussions it wants to with its contractors which supply work to the roadways of Michigan. If the Defendant does not wish to waive certain notice requirements, there is nothing in the current Court of Appeals Opinion which prevents the Defendant from choosing to not waive such requirements. Any argument to the contrary represents pure sophistry. MCR 7.302 (B)(2) and (B)(3) cannot be used as grounds for appellate jurisdiction either. This Michigan Supreme Court must deny the Defendant's Application for Leave to Appeal.

C. MCR 7.302(B)(4) Does Not Apply.

The Defendant's Application for Leave to Appeal fails to argue or show that the Defendant's Appeal involves an appeal prior to a decision of the Court of Appeals. Instead, this is an Appeal from an unpublished Opinion per curiam of the Court of Appeals. As a result MCR 7.302(B)(4) cannot serve as a basis for this Appeal. This Michigan Supreme Court must deny the Defendant's Application for Leave to Appeal.

D. MCR 7.302(B)(5) Does Not Apply.

MCR 7.302(B)(5) provides that an Application for Leave to Appeal can be granted where the Court of Appeals decision is clearly erroneous and would cause a material injustice or the decision conflicts with a decision of the Court of Appeals or the Michigan Supreme Court. Here, none of these factors apply.

First, the Court of Appeals decision is not clearly erroneous. In order for a decision to be clearly erroneous, a reviewing court must be left with a definite and firm conviction that an error was made. (See: **People** v **Parker**, 230 Mich App 337; 584 NW2d 336 (1998).) Here, the Court of Appeals properly ruled that the Defendant agreed to waive strict compliance with the notice requirements.

> "Nevertheless, we agree with Plaintiff's contention that Defendants waived strict compliance with Section 1.05.12 See **Jacob** v **Cumings**, 213 Mich 373; 182 NW 115 (1921).) " (Court of Appeals at p. 2.)

The record clearly supports this ruling. In fact, Defendants own Resident Engineer, Ralph Langdon, confirmed at his deposition that the notice requirements were simply not strictly adhered to. (**Exhibit 3** – Langdon Dep. at p. 26.) As a result, this Michigan Supreme Court is not left with a definite and firm conviction that an error was made in the Court of Appeals decision. The decision is not clearly erroneous.

Second, there is no evidence that allowing the unpublished Court of Appeals Opinion to stand will create a material injustice. The Court of Appeals did not render any form of a monetary award. The Court of Appeals simply remanded this case to the Court of Claims for a determination as to whether the Plaintiff was entitled to additional compensation and, if so, how much.

> "On remand, the trial court is thus instructed to determine whether Plaintiff was entitled to additional compensation and in what amount." (Court of Appeals Opinion at p. 2.)

According to the Court of Appeals, it is now up to the Trial Court to determine if the Plaintiff is entitled to any additional compensation. As a result, the Court of Appeals Opinion does not impose any specific financial liability upon the Defendant. There is no material injustice.

Finally, there is no evidence that the Court of Appeals decision conflicts with any other opinion from the Court of Appeals or from the Michigan Supreme Court. In fact, the Defendant fails to cite to one case showing any such conflict.

As a result, the Court of Appeals decision is not clearly erroneous, does not create a manifest injustice and is not in conflict with a decision from the Court of Appeals or the Michigan Supreme Court. MCR 7.302(B)(5) cannot serve as a basis of jurisdiction. This Michigan Supreme Court must deny the Defendant's Application for Leave to Appeal.

E. MCR 7.302(B)(6) Does Not Apply.

Nowhere, within the Defendant's Application for Leave to Appeal fails to show or argue that the Defendant's Appeal involves an appeal from the attorney discipline board. As a result MCR 7.302(B)(6) cannot serve as a basis for this Appeal. This Michigan Supreme Court must deny the Defendant's Application for Leave to Appeal.

The Defendant's Appeal does not involve any issue of significant public concern. Instead, the Defendant's Appeal is only about money. The Defendant does not wish to pay any additional compensation to the Plaintiff for work which the Defendant and the people of this great State of Michigan benefit from. The Plaintiff should not have to bear this substantial financial burden where the Defendant waived compliance with the notice

requirement. The Defendant has failed to demonstrate that any of the grounds contained under MCR 7.302(B) have been met. This Michigan Supreme Court must deny the Defendant's Application for Leave to Appeal.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I. **DID THE COURT OF APPEALS PROPERLY RULE THAT MDOT WAIVED STRICT COMPLIANCE WITH SECTION 1.05.12 OF THE 1990 STANDARD OF SPECIFICATIONS FOR CONSTRUCTION?**

Plaintiff/Appellee says:	Yes
Defendant/Appellant says:	No
Court of Appeals says:	Yes
Trial Court says:	Did not Address this Question

II. **DID THE COURT OF APPEALS PROPERLY RULE THAT THERE WAS A QUESTION OF FACT REGARDING WHETHER THE PLAINTIFF WAS ENTITLED TO ADDITIONAL COMPENSATION?**

Plaintiff/Appellee says:	Yes
Defendant/Appellant says:	No
Court of Appeals says:	Yes
Trial Court says:	Did not Address this Question

I. COUNTER-STATEMENT OF STANDARD OF REVIEW

This Michigan Supreme Court reviews a Court of Appeals Order pursuant to MCR 7.302(B) when deciding whether there are sufficient grounds to grant an Application for Leave to Appeal. Here, the Defendant fails to demonstrate that there are grounds for granting this Application for Leave to Appeal pursuant to MCR 7.302(B).

If this Michigan Supreme Court should choose to grant this Application for Leave to Appeal then it will review the Court of Appeals Opinion reversing the Trial Court's Order granting the Defendant's Motion for Summary Disposition de novo. (See: **Michigan National Bank** v **Laskowski**, 228 Mich App 710; 580 NW2d 8 (1998); **Borman** v **State Farm Fire & Casualty Co.**, 198 Mich App 675, 678; 499 NW2d 419 (1993).)

A Motion for Summary Disposition under MCR 2.116(C)(10) is only granted in cases where there is no issue of material fact and judgment in favor of the moving party is appropriate as a matter of law. **Radtke** v **Everett**, 442 Mich 368, 374; 501 NW2d 155 (1993).

In assessing a Motion for Summary Disposition under MCR 2.116(C)(10), the Court must give the benefit of reasonable doubt to the non-moving party. **All inferences must be drawn in favor of the non-moving party** and the Court acts in a **liberal manner** in finding a genuine issue of material fact.

> "When determining a motion for summary disposition pursuant to MCR 2.116(C)(10), **the trial court must give the benefit of reasonable doubt to the nonmovant** and determine whether a record might be developed that would leave open an issue upon which reasonable minds could differ. **Buczkowski** v **Allstate Ins. Co**. (On Rehearing), 198 Mich App 276, 278; 502 NW2d 343 (1993). **All inferences must be drawn in favor of the nonmovant**, **Mt. Carmel Mercy Hospital** v **Allstate Ins. Co**., 194 Mich App 580, 585, 487 NW2d 849 (1992), and summary disposition may be granted only if

> there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. . . This **Court is liberal in finding a genuine issue of material fact.**" **Buczkowski**, supra. (**Stehlik** v **Johnson**, 204 Mich App 53; 514 NW2d 508, 508 (1994).) (Emphasis Added)

Here, the Court of Appeals properly reversed the Trial Court's Order granting the Defendant's Motion for Summary Disposition.

II. COUNTER-STATEMENT OF THE RELEVANT AND CONTROLLING FACTS

On June 21, 1995, Plaintiff and the Defendant entered into a contract on Project M7703103559A ("Project"), which consisted of 2.2 miles of reconstruction along M-29 in St. Clair County. Plaintiff performed extra work outside of the scope of the original contract. This extra work resulted in additional costs and expenses to Plaintiff in the amount of $737,954.66.

From the start, the Project encountered unexpected difficulties and delays. Michael Aeck, an MDOT inspector on Project, described the Project as being one which was "designed as we went" due to the poor quality of the plans and the site conditions. (**Exhibit 4** - Aeck Dep at pp. 9, 10). The poor plans and site conditions resulted in Defendant continuously and consistently directing the Plaintiff to make modifications in the Project. These modifications forced the Plaintiff to delay planned and scheduled work. (**Exhibit 5** - Boddy Dep at pp. 41,49,52) This demanded rearranging of the Plaintiff's work created an inefficient allocation and use of its personnel and equipment. (**Exhibit 5** - Boddy Dep at pp. 41, 49, 52) The impact of these changes resulted in delays, extra work, and significant changes in the contract quantities, plans and character of the work. (**Exhibit 5** - Boddy Dep at pp. 41, 49, 52) Some of the impact of these changes is reflected in the amount of increase from the original contract award of $6,026,962.89 to the adjusted contract amount

of $7,328,193.07 for changes approved to date.

Early on, the Plaintiff became concerned with the problems and delays on the Project as a result of Defendant's inspectors and Defendant's failure to provide written authorization for extra work, or work requiring materially altered methods or different materials due to changed conditions or character of the work. (**Exhibit 5** - Boddy Dep at pp. 42, 49) The Plaintiff attempted to resolve disputes on the job but encountered uncooperative Defendant inspectors. (**Exhibit 5** - Boddy Dep at p. 57) The Plaintiff then went to Defendant's Resident Engineer on the job, Ralph Langdon ("Langdon") and attempted to resolve the Plaintiff's requests for payment of additional costs incurred as a result of the poor plans, site conditions and Defendant's methods of directing work on the Project. (**Exhibit 5** - Boddy Dep at p. 62) Langdon denied the requests and the Plaintiff took the requests to a District Construction Engineer Level meeting. (**Exhibit 5** - Boddy Dep at pp. 73, 74, 102, 103) Twelve (12) requests for increased compensation were considered by Defendant officials at the District meeting. Defendant approved some of the requests for increased costs; some of the requests for increased costs were withdrawn by the Plaintiff; others were left open pending additional information or clarification; and some requests were denied by Defendant. Defendant's District level response did not mention any notice of claim requirement. (**Exhibit 6** - Defendant District Level Response).

Subsequently, the remaining requests for increased costs were brought to a Region Meeting with the Defendant's officials. The six (6) remaining requests for additional compensation involved in this action were considered by the Defendant at this Region meeting and denied in part because the Defendant determined Plaintiff failed to comply with the underlying contract provisions regarding written notice of claim for extra

compensation and also in part based upon the merits of the requests. Subsequently, the six (6) remaining requests for additional compensation were brought to a Central Office Review meeting with Defendant's officials. Again, the Defendant denied each of the requests based in part on the notice of claim issue and also on the merits of each request.

The Plaintiff then brought suit related to the extra work that it performed, thus seeking additional compensation. The Defendant filed a Motion for Summary Disposition, which was granted by the Trial Court. The Plaintiff appealed the Trial Court's ruling granting the Defendant's Motion for Summary Disposition. The Court of Appeals then issued an Opinion reversing the Trial Court's Order granting the Defendant's Motion for Summary Disposition and remanding for further proceedings to determine whether the Plaintiff was entitled to additional compensation.

> "Nevertheless, we agree with plaintiff's contention that defendant waived strict compliance with Sec. 1.05.12. See **Jacob** v **Cumings**, 213 Mich 373; 182 NW 115 (1921). Here, the record indicates that defendant waived strict compliance with the written notice requirement by agreeing with plaintiff to resolve disputes arising with the plans and specifications of the project without the need of filing a written notice of intent to file a claim. Thus, the trial court erred, as a matter of law, in ruling that defendant did not waive strict compliance with Sec. 1.05.12(a) of the 1990 Standard Specifications for construction." (**Boddy**, at p. 2.) (**Exhibit 1**)
>
> "**On remand, the trial court is thus instructed to determine whether plaintiff was entitled to additional compensation and in what amount.**" (**Boddy** v **MDOT**, unpublished opinion per curiam of the Court of Appeals decided [February 28, 2003] (Docket No. 23741).) (Emphasis Added)

The Defendant then filed a Motion for Rehearing and the Court of Appeals denied that Motion for Rehearing.

> "**The Court orders that the motion for rehearing is DENIED.**" (**Exhibit 7** - Order of the Court of Appeals Dated April 18, 2003.) (Emphasis Added)

On May 9, 2003, the Defendants filed an Application for Leave to Appeal with this Michigan Supreme Court. This serves as the Plaintiff's Response in Opposition to the Defendant's Application for Leave to Appeal.

III. BRIEF SUMMARY OF THE ARGUMENT

The Defendant has failed to demonstrate any of the grounds for the granting of an Application for Leave to Appeal which appears at MCR 7.302 (B). As stated above, the issue in this case boils down to the Defendants desire to not pay the Plaintiff for extra work which it did. There is no issue of major public interest to the State of Michigan. The issue is simply money.

Furthermore, the Court of Appeals Opinion reversing the Trial Court's Order granting the Defendant's Motion for Summary Disposition is not clearly erroneous so as to justify granting the Defendant's Application for Leave to Appeal. The Court of Appeals properly ruled that the Defendant waived its notice requirement. In fact, the Defendant's own Resident Engineer confirmed this waiver at a sworn deposition. As a result, the Court of Appeals Opinion is not clearly erroneous, but is instead supported by the record. As a result, this Michigan Supreme Court must deny the Defendant's Application for Leave to Appeal.

IV. LEGAL ARGUMENTS

A. The Court of Appeals Properly Ruled That the Defendant Waived Strict Compliance With Section 1.05.12 of the 1990 Standard of Specifications for Construction.

Standard of Review = De Novo

In rendering its Opinion, the Court of Appeals ruled that the Defendant waived strict compliance with Sec. 1.05.12 of the 1990 Standard Specifications for Construction, which

provides that the contractor shall notify the Defendant's Engineer in writing of the Contractor's intention to make a claim for such extra compensation before beginning work on which the Contractor intends to base a claim.

> "Notice of Claim. - If the contractor intends to seek extra compensation for any reason not specifically covered elsewhere in the contract, the contractor shall notify the engineer in writing of the contractor's intention to make claim for such extra compensation before beginning work on which the contractor intends to base a claim or the contractor shall notify the engineer within twenty-four (24) hours after the commencement of the delay, suspension of work, loss of efficiency, loss of productivity or similar event on which the claim will be based . . . Failure of the contractor to give such information or to afford the engineer proper facilities for keeping strict account of actual costs of the work or delay upon which the notice of intent to file claim was made will constitute a waiver of the claim for such extra compensation or extension of contract time unless such claims are substantiated by department records and the extra costs were unforeseeable." (**Exhibit 8** - Section 1.05.12(a) of the 1990 Specs)

The Court of Appeals ruled as follows:

> "Nevertheless, we agree with plaintiff's contention that defendant waived strict compliance with Sec. 1.05.12. See **Jacob** v **Cumings**, 213 Mich 373; 182 NW 115 (1921). Here, the record indicates that defendant waived strict compliance with the written notice requirement by agreeing with plaintiff to resolve disputes arising with the plans and specifications of the project without the need of filing a written notice of intent to file a claim. Thus, the trial court erred, as a matter of law, in ruling that defendant did not waive strict compliance with Sec. 1.05.12(a) of the 1990 Standard Specifications for construction." (**Boddy**, at p. 2.) (**Exhibit 8**)

In determining that the Defendant waived strict compliance with Sec. 1.05.12, the Court of Appeals relied on the Michigan Supreme Court's controlling ruling in **Jacob** v **Cumings**, 213 Mich 373; 182 NW 115 (1921). In **Jacob**, the Michigan Supreme Court ruled that a party to a contract **may waive** the conditions or stipulations contained in a contract. If so, strict compliance with the terms of the contract is not necessary.

> "Plaintiff had a right to rest upon the agreement, or modify the same, or **waive** its terms. . . .The written agreement, after it was signed by the defendant, could be modified, and strict performance thereunder waived or abrogated by the parties. . . " (**Jacob**, 182 NW at p. 117.) (Emphasis Added)

Beyond the Michigan Supreme Court's ruling in **Jacob**, this Michigan Supreme Court has also ruled that waiver may be shown by evidence that a party, knowing of the defect or breach, made or received payment according to contractual terms. (See: **Holliday** v **Wright**, 134 Mich 608; 96 NW 949 (1903).) Additionally, the Michigan Supreme Court has stated:

> [A] waiver may be shown by proof of express language of agreement or inferably established by such declarations, acts and conduct of the party against whom it is claimed as are inconsistent with the purpose to exact strict performance. **Strom-Johnson Construction Co.** v **Riverview Furniture Store**, 227 Mich 55, 67-68; 198 NW 714 (1924).

Here, the Court of Appeals expressly stated in its Opinion that the record indicated that the Defendant waived strict compliance by agreeing with the Plaintiff to resolve disputes arising with the plans and specification without the need of filing a written notice of intent to file a claim.

> "Here, the record indicates that defendant waived strict compliance with the written notice requirement by agreeing with plaintiff to resolve disputes arising with the plans and specifications of the project without the need of filing a written notice of intent to file a claim." (**Boddy**, at p. 2.) (**Exhibit 1**)

The Court of Appeals is correct. In fact, the Defendant's Resident Engineer, Ralph Langdon, specifically testified at his sworn deposition that the claims procedure was not strictly adhered to. According to the sworn and submitted testimony of Mr. Langdon, the claims procedure was loosely adhered to because when a contractor encounters something in the field that was not anticipated – that contractor is going to keep working

and expect to get extra payment for the work.

> Q. With the regard to the 8 or 10 claims that the contract either abandoned or you were able to work out and compromise, do you know if those claims procedures were strictly adhered to?
>
> A. **Maybe not strictly adhered to. They were possibly adhered to loosely.** Most of the time **on extra work if the contractor encountered something on a project that we didn't anticipate** he's not going to stop work. **He's going to keep working and accept - expect to get extra payment for.** (**Exhibit 3** - Langdon Dep at pp. 39-40.) (Emphasis Added)

This testimony concerning the deviation from the claims procedure is put forth under oath by the Defendant's own Resident Engineer on the Project and is fatal to the Defendant's argument that it did not waive the notice requirement contained in Sec. 1.05.12(a).

Additional evidence of the Defendant's waiver of strict compliance with the written notice provision is found in the Defendant's May 19, 1997 response to the Plaintiff's requests for extra compensation. At a District Construction Engineer Level meeting conducted on May 6, 1997, James C. Hanson, the District Construction Engineer, approved some of the Plaintiff's requests for extra compensation, denied others and requested additional information with regard to the remaining requests. In reaching its decision regarding each of the requests at the May 6, 1997 meeting, the Defendant did not raise the issue of the Plaintiff failing to follow the written notice procedures of Section 1.05.12 (a) of the 1990 Specs. In fact, the Defendant actually approved payment for 2 of the 6 remaining requests in this action.[1]

Lastly, Horace Boddy testified under oath that although he was never specifically told that the notice of claim requirement was waived he was told that the issues regarding

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[1] However, Boddy disputed the amount of the approved payment.

extra compensation would be resolved later since it was important to get the project done. (**Exhibit 5** - Boddy Dep at pp. 57, 62, 68)

If the notice requirement demands that written notice be given prior to any extra work beginning, and if in reality Defendant resolves disputes or claims without the necessity of filing written notices, then the Defendant has waived the notice requirement under Sec. 1.05.12. **No other conclusion is possible**. The Court of Appeals properly analyzed this testimony and the record evidence presented and ruled that the Defendant waived strict compliance with Sec. 1.05.12(a) of the 1990 Standard Specifications Contract. The Defendant's Application for Leave to Appeal must be denied.

1. The Defendant's Reliance Upon Rea Construction Co v State Roads Commission of Maryland, 226 MD 569, 574; 174 A2d 577 (1961) is Misplaced.

In order to support its position that the Court of Appeals erred when it reversed the Trial Court's Order granting the Defendant's Motion for Summary Disposition, the Defendant cites to a 1961 case from the State of Maryland, **Rea Construction Co**. v **State Roads Commission of Maryland**, 226 MD 569, 574; 174 A2d 577 (1961). The Defendant's reliance upon **Rea** is misplaced. **First**, **Rea** is a 1961 case from the State of Maryland and offers no binding precedent in this matter. **Second**, **Rea** is factually distinguishable from the facts at hand. In **Rea**, a contractor brought suit to recover for extra work which it did on a road construction project. The **Rea** Court ruled that because the plaintiff, contractor, failed to comply with the notice requirements contained in its contract with the defendant, the defendant was not required to pay for this additional work. While the facts in this case are interesting, they have no bearing to the facts at hand. In

Rea, unlike here, there was no argument made that the **Rea** defendant waived the notice requirement. In fact, the **Rea** Court noted that if there had been evidence of a waiver by the defendant the result may have been different.

> "The courts are in general accord that a provision in a contract similar to that under consideration is valid, and, in the absence of conduct operating as a waiver or raising an estoppel hold that failure to give notice of an intention to claim extra compensation in the manner and at the time specified precludes recovery therefore." (Rea 226 MD at p. 574)

Here, unlike in **Rea**, the Defendant's conduct did operate as a waiver of the notice requirement. As a result, the facts in **Rea** are completely distinguishable from the facts at hand. **Rea** simply does not support the Defendant's position.

2. The Defendant's Reliance Upon Strom-Johnson Construction Co. v Riverview Furniture Store, 227 Mich 55, 67-68; 198 NW 714 (1924) is Misplaced.

The Defendant's reliance upon **Strom-Johnson Construction Company v Riverview Furniture Store**, 227 Mich 55, 67-68; 198 NW 714 (1924) is misplaced. In **Strom**, the plaintiff was a builder who entered into a contract with the defendant to expand its furniture store. At the end of construction, the defendant failed to provide full payment because the job was not done on time. The contract allowed the Defendant to recover a specified amount as liquidated damages for each day that the job was not done past its contract for completion date. The **Strom** plaintiff brought suit and the Michigan Supreme Court ruled that the defendant waived the completion date requirement when it demanded that extra work be performed. According to the Michigan Supreme Court wavier may be shown through the conduct of the parties.

> "The weight of evidence is persuasive of waiver, which is primarily an issue of fact. A waiver may be shown by proof of express language of agreement ***68*** or inferably established by such declarations, acts, and conduct of the party against whom it is claimed as are inconsistent with a purpose to exact strict performance. The following excerpt from Pomeroy on Contracts (2d Ed.) § 394, is fairly in point to the situation shown here:
>
> 'The party who is entitled to insist upon a punctual performance by the other, or else that the agreement be ended, may waive his right and the benefit of any objection which he might raise to a performance after the prescribed time, either expressly or by his conduct, and his conduct will operate as a waiver when it is consistent only with a purpose on his part to regard the contract as still subsisting and not ended by the other party's default.'
>
> [5] Defendant first breached this contract and caused delay by failing to provide space and water for plaintiff's operations as it agreed, and thereby set the time at large. It afterwards ordered extra work, much of which was necessarily carried on in connection with the original contract, and rendered its performance within the time impossible, a fact known to both parties, and which in effect resulted in a postponement by mutual consent." (**Strom**, 227 Mich at pp. 67-68.)

As a result, the Michigan Supreme Court in **Strom** ruled that a party can through its conduct waive contract requirements. Here, the Defendant through its conduct did waive the notice requirement. Consequently, the Court of Appeals properly reversed the Trial Court's Order granting the Defendant's Motion for Summary Disposition.

B. The Court of Appeals Properly Ruled that There Was a Question of Fact Regarding Whether the Plaintiff Was Entitled to Additional Compensation.

Standard of Review = De Novo

In reversing the Trial Court's Order granting the Defendant's Motion for Summary Disposition, the Court of Appeals properly ruled that there was a question of fact regarding whether the Plaintiff was entitled to additional compensation. The Court of Appeals ruled as follows:

> "Further, there was a genuine issue of material fact whether plaintiff was entitled to additional compensation for its highway reconstruction work." (**Boddy** at p. 2.) (**Exhibit 1**)

In arriving at this conclusion, the Court of Appeals noted Horace Boddy in his deposition testimony, indicated there were handwritten notations documenting the cost for excavating and disposing of temporary aggregate.

> "Specifically, although defendant maintains that plaintiff has failed to attach any records substantiating its alleged claims, we note that Horace Boddy, in his deposition testimony, indicated that there were handwritten notations documenting the cost for excavating and disposing of temporary aggregate off site in the amount of $91,407,37." (**Boddy** at p. 2.) (**Exhibit 1**)

As a result, the Court of Appeals remanded to the Trial Court to determine whether the Plaintiff was entitled to additional compensation.

> "On remand, the trial court is thus instructed to determine whether plaintiff was entitled to additional compensation and in what amount." (**Boddy** at p. 2.) (**Exhibit 1**)

The Court of Appeals came to the proper ruling. Here, the Trial Court granted the Defendant's Motion for Summary Disposition based upon MCR 2.116(C)(10). A Motion for Summary Disposition based upon MCR 2.116(C)(10) will only be granted where there is no genuine issue as to any material fact.

> "(10) Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." (**MCR 2.116(C)(10)**.)

In fact **all inferences must be drawn in favor of the non-moving party** and the Court acts in a **liberal manner** in finding a genuine issue of material fact.

> "When determining a motion for summary disposition pursuant to MCR 2.116(C)(10), **the trial court must give the benefit of reasonable doubt to the nonmovant** and determine whether a record might be developed that would leave open an issue upon

> which reasonable minds could differ. **Buczkowski** v **Allstate Ins. Co**. (On Rehearing), 198 Mich App 276, 278; 502 NW2d 343 (1993). **All inferences must be drawn in favor of the nonmovant, Mt. Carmel Mercy Hospital** v **Allstate Ins. Co**., 194 Mich App 580, 585, 487 NW2d 849 (1992), and summary disposition may be granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. . . This **Court is liberal in finding a genuine issue of material fact**." **Buczkowski**, supra. (**Stehlik** v **Johnson**, 204 Mich App 53; 514 NW2d 508, 508 (1994).) (Emphasis Added)

Here, the Court of Appeals properly noted that although the Defendants may claim that there are no records supporting Plaintiff's claim for extra compensation, Horace Body did provide testimony stating that such records may exist. When all inferences are drawn in favor of the Plaintiff, the non-movant, a genuine issue of material fact does exist and the Court of Appeals properly reversed the Trial Court's Order granting the Defendant's Motion for Summary Disposition.

V. CONCLUSIONS AND RELIEF REQUESTED

The Defendant has failed to provide any of the grounds necessary to grant its Application for Leave to Appeal pursuant to MCR 7.302(B). The issue here is simply one of money. There is no issue of major significance to the State of Michigan or of public interest. The Court of Appeals has simply ruled that the Trial Court erred in granting the Defendant's Motion for Summary Disposition. The Court of Appeals properly found that the Defendant waived the notice requirement and that a question of fact exists as to whether the Plaintiff is entitled to additional compensation.

WHEREFORE, Plaintiff respectfully requests that this Honorable Michigan Supreme Court Enter an Order:

I. Denying the Defendant's Application for Leave to Appeal; and

II. Granting the Plaintiff costs and attorney fees for having to respond to the Defendant's Application for Leave to Appeal; and

III. Awarding such other relief in favor of the Plaintiff as this Court deems just, equitable and appropriate.

Respectfully submitted,

O'REILLY, RANCILIO, NITZ,
ANDREWS, TURNBULL & SCOTT, P.C.

By: Lawrence M. Scott
Lawrence M. Scott (P30228)
Attorney for Plaintiff/Appellee

Dated: May 29, 2003

PROOF OF SERVICE

I served **Plaintiff/Appellee's Response In Opposition to the Defendant/Appellant's Application for Leave to Appeal** upon the attorneys of record and/or parties in this case on **May 29, 2003**. I declare the foregoing statement to be true to the best of my information, knowledge and belief.

✗ U.S. Mail
❑ Hand Delivered
❑ Express Mail Private
❑ Fax
❑ Messenger
❑ Other:

Mary S. Browne

J:\Boddy Construction Co\0006 MDOT\Appeal\Pleadings\Response Application Leave.doc
May 29, 2003

STATE OF MICHIGAN

COURT OF APPEALS

BODDY CONSTRUCTION COMPANY, INC.,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

UNPUBLISHED
February 28, 2003

No. 237471
Court of Claims
LC No. 00-017592-CM

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the opinion and order granting the motion for summary disposition brought by defendant Michigan Department of Transportation ("MDOT") under MCR 2.116(C)(8) and (10). We reverse and remand.

In this case, plaintiff is seeking $724,954.66 in additional compensation for highway reconstruction work performed along M-29 in St. Clair County. According to defendant, the construction contract expressly prohibited extra compensation in this case because plaintiff failed to provide timely notice to the MDOT engineer about its intention to seek additional compensation. Plaintiff counters that it was entitled to extra compensation because defendant waived this contractual provision. The trial court, without specifying the subrule under which it granted defendant's motion for summary disposition, found that plaintiff was not entitled to extra compensation because there was nothing in the record to indicate that defendant had given prior approval as required under the contract.

Because the trial court pierced the pleadings in granting summary disposition in defendant's favor, we review the grant of summary disposition under MCR 2.116(C)(10). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). As clarified by the Supreme Court in *Maiden*:

> The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence

produced at trial. A mere promise is insufficient under our court rules. [461 Mich at 121.]

In this case, the parties entered into a highway contract, which was governed by the 1990 Standard Specifications for Construction. Under § 1.05.12(a), the Notice of Claim provision, "the Contractor shall notify the [MDOT] Engineer in writing of the Contractor's intention to make claim for such extra compensation before beginning work on which the Contractor intends to base a claim. . . ." It is undisputed that plaintiff failed to provide the MDOT engineer in question with written notice of its intent to file a claim before beginning the work upon which plaintiff's claim is based.

Nevertheless, we agree with plaintiff's contention that defendant waived strict compliance with § 1.05.12. See *Jacob v Cumings*, 213 Mich 373; 182 NW 115 (1921). Here, the record indicates that defendant waived strict compliance with the written notice requirement by agreeing with plaintiff to resolve disputes arising with the plans and specifications of the project without the need of filing a written notice of intent to file a claim. Thus, the trial court erred, as a matter of law, in ruling that defendant did not waive strict compliance with § 1.05.12(a) of the 1990 Standard Specifications for Construction.

Further, there was a genuine issue of material fact whether plaintiff was entitled to additional compensation for its highway reconstruction work. Specifically, although defendant maintains that plaintiff has failed to attach any records substantiating its alleged claims, we note that Horace Boddy, in his deposition testimony, indicated that there were handwritten notations documenting the cost for excavating and disposing of temporary aggregate off site in the amount of $91,407.37. On remand, the trial court is thus instructed to determine whether plaintiff was entitled to additional compensation and in what amount.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio

(g) the opinion or order of the Court of Appeals, unless review of a pending case is being sought;

(2) A notice for hearing stating that the application will be submitted to the Court on a date which is on a Tuesday at least 21 days after the filing of the application;

(3) Proof that a copy of the application was served on all other parties, and that a notice of the filing of the application was served on the clerks of the Court of Appeals and the trial court; and

(4) The fee provided by MCR 7.319(B)(7)(a).

(B) Grounds. The application must show that

(1) the issue involves a substantial question as to the validity of a legislative act;

(2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;

(3) the issue involves legal principles of major significance to the state's jurisprudence;

(4) in an appeal before decision by the Court of Appeals,

(a) delay in final adjudication is likely to cause substantial harm, or

(b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid;

(5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or

(6) in an appeal from the Attorney Discipline Board, the decision is erroneous and will cause material injustice.

(C) When to File.

(1) *Before Court of Appeals Decision.* In an appeal before the Court of Appeals decision, the application must be filed within 28 days

(a) after a claim of appeal is filed in the Court of Appeals;

(b) after an application for leave to appeal is filed in the Court of Appeals; or

(c) after entry of an order by the Court of Appeals granting an application for leave to appeal.

(2) *Other Appeals.* Except as provided in subrule (C)(4), in other appeals the application must be filed within 21 days

(a) after the Court of Appeals clerk mails notice of an order entered by the Court of Appeals;

(b) after the filing of the opinion appealed from; or

(c) after the Court of Appeals clerk mails notice of an order denying a timely filed motion for rehearing.

(3) *Later Application.* A delayed application may be filed, if it is accompanied by an affidavit explaining the delay. However, a delayed application may not be filed more than 56 days after the Court of Appeals decision.

(4) *Decisions Remanding for Further Proceedings.* If the decision of the Court of Appeals remands the case to a lower court for further proceedings, an application for leave may be filed within 21 days after

(a) the Court of Appeals decision ordering the remand, or

(b) the Court of Appeals decision disposing of the case following the remand procedure, in which case an application may be made on all issues raised in the Court of Appeals, including those related to the remand question.

(5) *Effect of Appeal on Decision Remanding Case.* If a party appeals a decision which remands for further proceedings as provided in subrule (C)(4)(a), the following provisions apply:

(a) If the Court of Appeals decision is a judgment under MCR 7.215 (E)(1), a timely appeal stays proceedings on remand unless the Court of Appeals or the Supreme Court orders otherwise.

(b) If the Court of Appeals decision is an order other than a judgment under MCR 7.215 (E)(1), the proceedings on remand are not stayed by an application for leave to appeal unless so ordered by the Court of Appeals or the Supreme Court.

(6) *Orders Denying Motions to Remand.* If the Court of Appeals has denied a motion to remand, the appellant may raise issues relating to that denial in an application for leave to appeal from the decision on the merits.

(D) Opposing Brief; Cross Appeal.

(1) Any party may file 8 copies of an opposing brief before the day the application is noticed for hearing. He or she must file proof that a copy of the brief was served on all other parties.

(2) An application for leave to appeal as cross appellant may be filed with the clerk by the date the appellant's application for leave is noticed for hearing or within 21 days after the appellant's application is filed, whichever is later. The application must comply with subrule (A).

(E) Emergencies. Any party may move for immediate consideration of a pending application by showing what injury would occur if usual procedures were followed. The motion or an accompanying affidavit must explain the manner of service of the motion on the other parties.

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

BODDY CONSTRUCTION COMPANY, INC.,

Plaintiff,

-vs- Case No.: 00-17592-CM

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant.
_____/

The Deposition of RALPH LANGDON, taken before Pamela K. Lindsay, Certified Shorthand Reporter and Notary Public in and for the County of St. Clair, State of Michigan, at the Offices of MDOT, 3050 Commerce Drive, Fort Gratiot, Michigan, on the 2nd Day of March, 2001, at 10:17 a.m.

APPEARANCES:

O'REILLY, RANCILIO, NITZ, ANDREWS, TURNBULL & SCOTT, P.C.
Attorneys at Law
One Sterling Towne Center
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Sterling Heights, Michigan 48313
BY: LAWRENCE M. SCOTT, ESQ.
GARY A. HANSZ, ESQ.

Appearing on behalf of the Plaintiff:

DAVID D. BRICKEY, P.C.
Attorney at Law
425 West Ottawa Street
Lansing, Michigan 48909

Appearing on behalf of the Defendant:

Also Present: Horace Boddy

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during the underground construction work, sewer -- storm sewer work.
Q What types of difficulties were there?
A Private utilities in the way, private utilities not correctly shown on the plans so we couldn't place the sewer on the alignment that was shown. And then we also had a big steam tunnel that was owned by Detroit Edison that was in the way of our construction to the point where we had to go under it and change all of our grades. And it -- there was considerable extra work done the first year.
Q Isn't it true that they actually moved the location of the storm sewer from outside, or in the roadway to outside the roadway?
A I believe it was about a half a mile that we moved it out of the right-of-way line out to the roadway.
Q In your opinion would that have -- not knowing that all of these conflicts with utilities and things were going to be there, would that have interrupted any sequencing from the contractor's point of view?
A Yes, it did.
Q Would it have caused any delay?
A Yes.
Q Okay. Actually, when I say delay I mean delay and extra work, additional work that the contractor had

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to do that put him behind schedule. When I say delay I don't mean that he set out there and couldn't do anything. We were still working, but we had more work to do in the same amount of time. And instead of starting at this end and going to this end, without sewer or paving work isn't it true that they had to start at this end and then hit a conflict and moved down to the center?
A That did happen, but, you know -- it may have happened. I know of one instance where it happened.
Q Okay. Has that project ever been finaled out, do you know?
A Yes.
Q Do you know what they did with Buntz Creek? What did they ever do with that?
A I have no idea.
Q Wasn't that part of this project?
A Originally it was. We were supposed to do some work at the outlet of Buntz Creek because all the outlet water went through Detroit Edison.
Q Do you know if that was deleted from the contract?
A Actually, that wasn't part of the original contract. That was something that came up later and we tried to add it to the contract. And then we added it and then deleted it again.

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Q So to the best of your knowledge that portion of the work has been deleted from the contract?
A It was from that contract, but I don't know if it's ever been done, any work's been done there since then on another contract.
Q And to the best of your knowledge the job then was finaled out?
A Yes.
Q When was it finaled out?
A 1999 I believe. I'm sure it was 1999.
MR. SCOTT: Let's go off the record for a second.
(Deposition Exhibit Number 1 was marked for identification)
Q (Continuing by Mr. Scott): Mr. Langdon, I'm gonna show you what I've identified as Deposition Exhibit Number 1. And, for the record, this contains five different letters, three -- the first three from Boddy to yourself, and then the last two from yourself to Boddy. And ask you just to take a look at those briefly and tell me if you can identify those?
A I'm familiar with all of these. They're letters documenting concerns and problems that we had in 1995, mainly with underground work.

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Q There was a -- in conjunction with part of the contract documents in this project there was a critical path that was prepared by Boddy and submitted to MDOT initially in this project wasn't there?
A Yes.
Q And because of some of the problems that we've already talked about today, that critical path was altered was it not?
A Yes.
Q What were some of the principle changes the first year in that critical path, if you recall?
A Mainly the first year the critical path was, as we stated before, we had to change some of the sequencing on the storm sewer, but also we had no outlet for the storm sewer. All of the storm water was taken from the west end of the project and all went to the east and outleted into the Buntz Creek. But we had a problem with the outlet in that we couldn't construct the sewer to the outlet. So Boddy was unable to work on some portion of the project they planned to do the first year. So he could not prepare the grade. He couldn't -- first of all, he couldn't complete the sewer, and then he couldn't prepare the grade for paving as he showed on his

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Q Okay.
A -- but I would -- I would -- if I reviewed it I usually didn't say anything but I considered it.
Q At these project meetings that you talked about, which were weekly or otherwise, was there any discussion at any of these projects about extra work claims?
A Oh, I'm sure there were. We had -- we had many, many extras on this project.
Q And did any -- let me ask you this. Does any particular extra strike your -- strike your memory at all with regard to having formally followed the claim procedure outlined in this extra?
A If it's an extra and MDOT agrees with it, it's not a claim. An extra is not a claim.
Q Right. I understand. But would it end up in the force account?
A My recollection is all the force account records were kept for extra work that we as MDOT recognized the contractor had reimbursement coming. We mainly kept it so we would have some justification for the amount of the money that we recommended that the contractor receive.
Q Okay. Would you agree with me, however, that the claims are the extra works -- extra work that wasn't

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accepted or approved?
A That's --
Q Isn't that how it turns into a claim?
A Well --
Q I mean, doesn't it kind of start as extra work?
A First of all, there has to be a dispute before there's a claim.
Q Okay. Right.
A So if the contractor feels he's got additional work or has done additional work or has a problem with the plans or the specifications, there's a discussion about it and MDOT may agree and they may disagree. Sometimes it's in writing and the discussion may be at a weekly meeting. And hopefully most of these things are resolved at that time. But if the contractor does not agree with MDOT's position and wants to go beyond that, you know, he can't accept what MDOT has said --
Q Correct.
A -- so he wants to go farther, that's when it becomes a claim.
Q Was there discussions about any extra work between Boddy and MDOT at these weekly meetings that MDOT and Boddy didn't agree about and it was going to turn into a claim? Was there ever any discussion about

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how to handle it or what to do with it?
A The only one I can think of offhand was -- we talked about previously was the relocation of the sewer, about a half a mile of sewer. We felt it could be done for approximately the same price. We used more sand, so we allowed extra payment for additional sand that was used. But other than that we felt it didn't make any difference where Boddy Construction -- Construction placed the sewer, whether it was out at the right-of-way line or under the pavement. And that specifically was discussed at a weekly meeting. And I remember that later Mr. Boddy brought a consultant in to take a look at it and he disagreed with it. And that was one of the claims that later was resolved.
Q Do you recall any conversation between representatives of MDOT and representatives of Boddy where there were claims for extra work or claims, if you will, and the discussion revolved around or resolved by saying let's get the project done and we'll finish -- we'll worry about that later?
A No, I do not.
Q Okay. You never heard anything like that?
A The only thing I heard from Mr. Boddy is he claimed he heard it from another MDOT employee, but it wasn't

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me.
Q Okay. So you didn't hear it?
A No.
Q It was never said in your presence?
A No.
Q Okay. Do you know -- first of all, who is Noel Smith?
A Noel Smith was the construction engineer at the metro district level. He had an office in Southfield. He would have been my direct supervisor for the beginning portion of the project.
Q And was he replaced at some time throughout this project?
A Yes. He retired. I don't recall exactly when. But he was replaced.
Q Was he working as a consultant also?
A No. He retired retired.
Q Who took his place?
A Jim Hanson.
Q Do you know if Mr. Smith ever approved any extras or extra work on this particular project?
A I would -- offhand I'd say he probably did. Specifically I can't give an example.
Q Do you know if Jim Hanson ever approved any additional compensation for this project?

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A Yes.
Q Do you recall what it was?
A No.
Q Do you know if Jim Hanson ever recommended the payment of additional compensation that was not adopted or approved by MDOT?
A Yes.
Q Do you know what that was for?
A Specifically right offhand I can't. But it was -- I remember it was a meeting that we had. I believe it was at Boddy's office. And Mr. Hanson attended, and he wrote up his opinion of all the items that we talked about. So it's covered in Mr. Hanson's letter, but I specifically can't remember the item that we were talking about.
Q Do you remember whether it had anything to do with the aggregate and the driveways being placed and replaced?
A It may have.
Q Do you recall how much it was that he recommended --
A No.
Q -- for the additional compensation?
A No.

(Deposition Exhibit Number 2 was marked for identification)

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Q (Continuing by Mr. Scott): Mr. Langdon, I'm gonna show you what I've identified as Deposition Exhibit Number 2. Those are various sections from the standard specification book. And ask you, for the record, if you can just look through those briefly and identify those?
A It appears that they're excerpts from a 1990 Specification for Construction with the MDOT specifications. It appears to be all of Section 105 under "Control of Work", and Section 1094 and 109 -- correction. 10 -- 1.09.04 and 1.0905, Section 1.
Q Were those the sections which were in effect at the time that this project was constructed?
A They appear to be. They don't specifically say which specification book they came from. But if they're from the 1990 book they would have been applied.
Q With regard to the eight or ten claims that the contract either abandoned or you were able to work out and compromise, do you know if those claims procedures were strictly adhered to?
A Maybe not strictly adhered to. They were possibly adhered to loosely. Most of the time on extra work if the contractor encountered something on a project that we didn't anticipate he's not gonna stop work. He's gonna keep working and accept -- expect to get

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extra payment for. Now, normally --
Q That's generally speaking --
A Right.
Q -- the way it goes, right?
A Right. Normally, you know, we don't know how much it's gonna cost. The contractor doesn't know how much it's gonna cost. So we -- even though we agree that the contractor is gonna get reimbursed, we don't really know how much. So we try to keep records of what he does so at a later date we can pay him, even though it's not a claim. It's just extra work.

MR. SCOTT: Can we take two minutes?

MR. BRICKEY: Yeah, sure.

(Recess)

MR. SCOTT: Okay. Back on the record.

Q (Continuing by Mr. Scott): Just by way of the historical background, at the resident engineer's level for this particular project you were the resident engineer when it started were you not?
A Yes.
Q And then you left in '97?
A '97.
Q Okay.

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A It wasn't -- it wasn't quite finished at that time.
Q After you left who became the resident engineer for this project, do you know?
A Mary Lou Masco.

MR. SCOTT: off the record.

Q (Continuing by Mr. Scott): And do you know if she finaled out the project in '99, or was there somebody after her?
A Well, I was -- physically I finaled it out.
Q Who was the resident --
A Larry Young was the resident at that time when the final estimate was sent in.
Q And was there anybody between Mary Lou and Larry Young?
A Not that I recall.
Q All right. So as to the resident engineer there was Ralph, then Mary Lou, then Larry Young?
A Yes.
Q Okay. Now, as to the district engineer, starting with Noel Smith, who did we have, do you know?
A District construction engineer was Noel Smith and then Jim Hanson. And I'm not sure if there was anyone after him during the -- well, there would have been -- up until the time it was finaled out in '99 let's say it would have been Larry Washburn.

In The Matter Of:

BODDY CONSTRUCTION v.
STATE OF MICHIGAN-DEPT. OF TRANSPORTATION

Michael Aeck
Vol. 1, April 20, 2001

Esquire Deposition Services
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Original File TFAECK~1.TXT, 16 Pages
Min-U-Script® File ID: 2634004098

Word Index included with this Min-U-Script®

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if you recall?
A: M-59 between Romeo Plank and Hayes.
Q: How many years did that last?
A: That was three or four years.
Q: What was your recollection of this project at the outset? What was supposed to be done? Was it done on time, things of that nature? What was this project, the Gratiot Avenue Project, supposed to do?
A: Oh, the Gratiot Avenue was complete new drainage, complete new roadway.
Q: And what was supposed to have been done first? Do you recall when the project was supposed to have started?
A: I believe the project started, I want to say July. Normally the first thing that would go on would — I believe in that in case stands — in that case, I believe it was sewer work started first, the drainage.
Q: What do you recall of that, if anything?
A: The drainage?
Q: Right.
A: It was — to me the drainage — I would almost say we designed it as we went.
Q: What do you mean?
A: So many existing utilities and different problems that we just — we had a set of plans, but we would come up to an obstacle or something and then have to move, relocate the

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drainage from the plans.
Q: I'm going to show you, without marking it as an exhibit, a xeroxed photocopy of this set of plans for this particular project. Are these the set of plans that you were referring to? Take a quick look at them if you could.
A: It seems to be, yes.
Q: Did you ever encounter any difficulties with utilities not shown on these plans?
A: Yes.
Q: Was that more than once?
A: Yes. It was quite often.
Q: Would that have disrupted the sequencing of the work?
A: Yes.
Q: What would you do to work around that?
A: At times we'd either have to have the utilities relocated; other times we tried to shift the drainage system to miss the utilities.
Q: Do you know if the sewer was ultimately relocated within the roadway?
A: Yes, it was.
Q: It wasn't part of original design, was it?
A: No, it wasn't.
Q: Why was it done that way?
A: The particular area I'm thinking, down near those

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restaurants down there, was utilities in the way.
Q: Okay. What other difficulties did you encounter with regard to the drainage in this project, if you recall?
A: There was no outlet for it.
Q: Do you know if that was ever resolved?
A: Yes. That was — there was no permit. To drain in — the main drain was under the Edison plant there. I can't remember the name of the drain, but there was never a permit drawn to tap into that.
Q: Whose obligation would that have ordinarily been?
A: That I don't know if it would have been contractor or state, I don't know.
Q: Do you know if that issue was resolved?
A: Eventually, yes.
Q: Do you know who obtained the permit?
A: No, I don't.
Q: What other difficulties did you encounter with regard to the drainage or the sewer work?
A: That would be the main that I could think of.
Q: What about the pavement work?
A: Pavement didn't start until after I left.
Q: Was it supposed to have started before you left?
A: Yes.
Q: Do you know why it didn't?
A: Not really.

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Q: Was it ready — was any portion of it supposed to have been paved in '95?
A: Yes. All I can recall is that they brought the paving train up in November, I believe it was, and when I went deer hunting, I came back expecting something to be paved, but the weather turned bad and they never started the paving train.
Q: Do you know when the, according to the original sequence, when the paving was supposed to have started?
A: No, I don't.
Q: Do you know why it was delayed?
A: Other than problems with drainage and whatever, no, I don't.
Q: Okay. Were you — in your involvement with regard to these particular delays, was there ever any discussion between yourself and any representative of the general contractor, Boddy Construction Company, with regard to any potential claims for extras?
A: I don't recall any, no.
Q: Okay. And was there ever — did you attend any job meetings, regular job meetings?
A: Yes.
Q: Weekly job meetings, I think they were referred to?
A: Yes.
Q: Who else from M-DOT would have attended those meetings?

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

BODDY CONSTRUCTION COMPANY, INC.,

Plaintiff(s),

vs Case No. 00-17592-CM
Hon. Peter D. Houk

STATE OF MICHIGAN,
MICHIGAN DEPARTMENT OF TRANSPORTATION,
Defendant(s). /

Deposition of **HORACE BODDY**, taken in the above-entitled matter before Stenograph Reporter, Kelly Forfar, at **12900 Hall Road, Suite 350, Sterling Heights, Michigan** on **Monday, April 30, 2001**, commencing at about **11:00 A.M.**

APPEARANCES:

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Appearing on behalf of the Defendant(s).

INDEX OF WITNESSES

EXHIBITS

(Exhibits retained and attached by reporter.)

Sterling Heights, Michigan
Monday, April 30, 2001

D E P O S I T I O N

(On record at about 11:28 a.m.)

HORACE BODDY

was called as a witness, and having been first duly sworn, was examined and testified as follows:

MR. BRICKEY: Let the record reflect this is the time and place of the taking of the deposition of Horace Boddy taken pursuant to Notice and stipulation to be used for all purposes allowed under the Court Rules.

EXAMINATION

BY MR. BRICKEY:

Q. Will you please state your full name for the record.

A. Horace Henry Boddy.

Q. Have you ever had your deposition taken before?

A. Yes, I have.

Q. I know you have sat through all of the depositions in this case so far and you told me you have had your deposition taken before. We're still going to cover a couple of ground rules. As you know, you have to give a verbal response to my questions. You can't shake your head yes or no or say huh-uh or uh-huh, things like that. If you have trouble hearing me or understanding me, let me know and I will be happy to repeat or rephrase the question, okay?

A. Correct.

Q. If you answer my question I am going to assume that you both heard it and understood it; fair enough?

A. Yes.

Q. What is your current address?

A. 849 Crystaline, Marysville Michigan.

Q. The Deposition Notice that I sent to you, through your attorneys actually in this case, asked you to bring several documents and things with you. Did you bring anything to the deposition?

A. All I did is bring two pieces of filter fabric.

Q. Filter fabric?

A. Yes, the rest counsel has had.

Q. Number 6 on my Deposition Notice that I had sent off to you on the second page said to bring all Michigan Department of Transportation records that substantiate Plaintiff's claim relating to reconstruction on the I-94

soil engineer on the job daily, so we had to wait -- we got so much clay grade ready, and then we had to wait for a soil engineer to come from Lansing.

Q. Is there anything that you relied upon in any of the bid documents to indicate that a soil engineer would be on site daily?

A. I did not know that, I didn't even know that a soil engineer had to be testing. There is no place in the 1990 specification, bid documents or anything that says a soil engineer has to check clay grade.

Q. Who is supposed to check it, in your opinion?

A. I think there is about seven inspectors out there who have checked clay grade for elevation, and I thought they would check it.

Q. How did the fact that -- if it is a fact, how did the statement of Gene Coglin that a soil engineer had to check the clay grade throughout the driveway impact Boddy's construction of the road?

A. Gene Coglin wanted sand grade carried through on an even course inside of the clay grade. And if there was bad soil in the area, dig out the bad soil and put sand in there -- or clay -- that might carry underneath the driveways, which I think it did in a couple of places but I don't know for sure. But that's the way he wanted them built.

Q. So how did that impact the number of times that Boddy had to remove and replace the temporary aggregate in the driveways?

A. Well, we first started out and we removed the pavement. And then they asked for stone to go in on the top of that rough clay grade. So we put the stone in until we started in the area of full clay grade. And we started in that area with full clay grade, we took that stone out, trucked it to the piles, came back and got down to the clay grade and had that tested. And then we would go ahead and put stone back in. And then after the whole thing got tested we would come through with our sand. So we had to move the stone off the clay grade again, put our sand in because you wouldn't do one little driveway, you had to carry on through according to Gene. So then we put the sand in, and then before -- we are going to take the sand down to final grade so we had to put stone back in there because they wouldn't -- I'm saying, because you had to get compaction and everything to your sand. Then they come to fine -- to put your sand to grade, fine grade, and you had to remove the stone again. Then you come through with your fine grade and then you got that okayed, and then you had to go back and get your fabric to go on top of it. You put that down, and then you brought your stone all the way through. But before that happened you -- and I skipped one operation, you had to put the drain tile

in and that stone had to be removed for that because they didn't want stone mixed with anything going in or around that drain tile, it was a different aggregate, it was -- like a pea stone went in around the trenches. And so you had to build the driveways back up again. So every time we had to go through there, which was about 12 times, we had to remove that stone.

Q. In your opinion, there were about 12 steps to creating this road?

A. Yes, there was.

Q. When you say the Complaint says -- the document says that Boddy had to remove the temporary aggregate 12 times, do you mean you had to remove it and replace it -- in other words, remove it 12 times and then replace it 12 times or remove it six times and replace it six times?

A. We removed it and replaced it 12 times.

Q. So 12 times you pushed it out or removed it?

A. Yes.

Q. And then 12 times you pushed it back in?

A. Right.

Q. Now, Boddy's original intent, if I understand you correctly, is you were going to have -- you were going to construct the road, the various layers to the road, you were going to do everything other than these 40-foot driveway sections, right, at the time?

A. Right, we were going -- we were going to have the 40-foot sections done first.

Q. Let me back up. When they took the old pavement out and then you had this clay material --

A. Right.

Q. -- Boddy's intent was to place the stone down for the temporary driveway?

A. No, we were going to dig it right down then, put that machinery in back there, have Gene here, come back and stake the clay grade, you know, and try to keep up with the pavement removal.

Q. So you were going to construct the driveway at the same time as the rest of the road, then?

A. Repeat your question.

Q. Were you going to construct the driveways at the same time as the rest of the road?

A. You got to repeat that question.

Q. The driveways -- there are various layers to this road, clay and sand and so on and so forth. The driveways have the same layers, correct?

A. Correct.

Q. Was Boddy's intent when it bid this to construct those layers from the driveway at the same time it constructed those layers for the road adjacent to the driveways?

road and the driveway simultaneously?
A. First reason is he needed the clay grade inspected by MDOT soils, what they called soils, which was not in the spec book and I didn't fight him on the other because he was corruptive, we got a thousand foot more road to come over.
Q. I'm sorry, they got what?
A. A thousand feet of road they would come over. They didn't hold us up a lot, we never argued about that. If it was a small point, I wouldn't have argued about it. But, no, he let us get so many feet and then come over. We never had soils on a job before in my life. It's not in the spec book, not in the black book or anything. Then he said if there is a bad spot in the clay grade he wanted it dipped down or whatever, which they did some of it but not very much. But then he might want extra drain tile put in there, soils might want extra drain tile. You never knew what you were doing until after soils come and then you had to go back and get your -- whatever soils told them to do, we did, put extra drain tile in, dig down and put extra sand in or extra clay and compact it, there is some of that going on all the time.
Q. Okay. When was Boddy first notified that it had to construct the layers of the driveway and the road simultaneously?
A. I think it was the first part of June right after

we went out there and got some of the pavement broke up.
Q. June of '95?
A. '95.
Q. And when did Boddy first begin constructing the layers of the driveway and the road simultaneously?
A. Right thereafter, right after -- that weekend that Gene Coglin was gone. Gene Coglin went to work about four days and then he would have vacation time or something and he wouldn't be there.
Q. So June of '95, Boddy is told that it has to construct the layers of the driveway and the road simultaneously?
A. Either June or July.
Q. And then June or July of '95 is when Boddy actually began constructing the layers of the driveways and the roads simultaneously?
A. Yes.
Q. Before Boddy submitted its bid -- well, before we get there. Johnson Anderson did the staking for the project for Boddy?
A. Yes, it did.
Q. Before Boddy submitted its bid, did you have any discussion -- or anybody from Boddy have a discussion with Johnson & Anderson about additional compensation for staking because of plan errors or omissions?

A. We read that statement in the book, which is in the spec book, about four hours, we took it as four hours per project because you take one single error and knew it could be corrected in an hour or so, but over the project we took it as four hours per the whole project.
Q. And you made that decision before you submitted the bid, correct?
A. I would say, yes.
Q. Now, I know you told me before Boddy submitted its bid that you didn't have any conversations with Ron Boddy, that is, about Work Safe's proposal other than the actual dollar amount. Do you know if Ron had any discussions with Work Safe about what work was included in its proposal?
A. No, it was very well spelled out.
Q. And one of the items in this lawsuit involves a claim for traffic maintenance during the winter shutdown period of '95 and '96?
A. Correct.
Q. Is it your opinion that -- or is it your position that traffic control maintenance devices were not required in the '95, '96 winter shutdown period at the time that you submitted the bid?
A. Yes.
Q. That's your position?
A. Our position, if everything went off -- when this

job first come out for bid there was a phase one project and there was quite a penalty to the phase one project. But they dropped that phase one because they knew no contractor would do it. In fact, when we first looked at it we put a lot of money in because we didn't want to take the penalty out of our pocket. I think we had 30-some days that we would have to pay a penalty. And if it went as phase one did, we would never need no traffic control. But when the sewers had to be all relocated, as Mike Aek testified, that threw the thing right down the tube, we couldn't do it. We would hop, skip and jump, tore the pavement up all over the place just to keep going because MDOT didn't want us to shut the job down and I didn't want to shut the job down because of the politics of the town. So we kept going to try and make some progress. Because in the specifications, if we -- according to the black book, if we shut the job down, MDOT had to pay us blue book for our machinery as on standby.
Q. Okay. Now Boddy came up with a progress schedule?
A. Yes, we did.
Q. And you had an original progress schedule?
A. Yes, we did.
Q. Is that after it was awarded the job?
A. Yes, it was.
Q. Under Boddy's original progress schedule, were traffic control devices required during the '95, '96

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but he wants a drain tile over top of the trenches. So we did that --

Q. The fabric over the trenches?

A. On top of the trenches.

So then he wants us to banana knife, cut like a banana in the fabric, so -- for the wire they were getting in the trenches. And then it was Gene's idea to install ten feet of fabric behind the drain tile.

Q. Okay.

A. And at that time I said, show me where it is, how you are going to pay me for it, and we will do it. He says, we'll take care of it at a later date. I said, that's not what the plans were. So they went and got a set of plans. I said, where does it show you that. Read back on the page of the spec book, it don't call for that. And I never have been paid for that fabric as of today. And MDOT don't work that way, MDOT pays you for what you do.

Q. The fabric you have been paid for is from edge drain to edge drain, correct?

A. Correct.

Q. And who is the concrete specialist from MDOT?

A. I am trying to think of his name.

Q. Let me ask you this you can't recall. There has been a lot of people, unfortunately, that worked on this job that seem to have passed away. Do you know if this concrete

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specialist is still with us?

A. Yes, he is.

Q. Let me have you think about it a little bit further.

A. He might be retired, MDOT retired a lot of people.

Q. That's true.

Any idea on his name?

A. I had it this morning when Gary and I talked about it but I don't remember the name.

Gary, do you remember?

(Whereupon a discussion was held off the record.)

Q. (BY MR. BRICKEY): That's okay if you don't remember --

A. I don't remember.

Q. The portion of the bid documents, project documents, that you relied upon to come up with the location of the fabric -- I will show you a copy of page 111 of the proposal, it says: Geotextile separator will be measured and placed in the limits of the OGDC as shown on the plans.

A. Correct.

Q. Is that the sentence that you relied upon?

A. Yes -- you refer to your black book, that's what they call the drain style trench.

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Q. That's the sentence that you relied upon to determine the extent of the placement of the fabric?

A. Plus, when we were a little bit confused in the office we took the square footage under there, multiplied it by the quantity that was on the bid sheet and the printer would come out and so that's what we figured.

Q. Did you do that calculation before you submitted the bid?

A. I think we didn't do that calculation until Gene and I got in a big hassle to see if we were going to have enough fabric.

Q. Is there anything else other than this sentence that I read that you relied on to determine the extent of the location of the fabric?

A. If you go back in that specification a little bit further -- and I brought with me today two different kinds of fabrics. And the black fabric here is what went in the drain tile trench and you read that real clear, that's a different kind of fabric, this black piece of fabric which went in the drain trial trench. And if you read how this was placed, it is placed up to that trench and laps, which they made us go over the top of that. The white piece of fabric is the geotextile fabric which is the stone separator.

Q. My question is whether you relied on anything other than the sentence, quote, geotextile separator will be

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measured and placed at the limits of the OGDC as shown on the plans, end quote, in reaching your conclusion that the fabric was only to be placed from edge drain to edge drain?

A. The only difference in that is going back to your 1990 specification book and looking at the specification book where the two fabrics come together. And it shows just what I am talking about.

Q. Okay. Nothing else in the bid documents, plan documents, though?

A. Correct.

Q. Now, the sentence that I have been referring to on page 111, that's under the heading of pay items, correct?

A. Yes, it is.

Q. September of '95, you have a conversation with Gene Coglin and this concrete specialist, whose name you can't recall, about the placement of the fabric?

A. Yes.

Q. And you left off telling me that you told Gene, show me where it says I have to do it this way, extending it beyond the -- beyond what, the drain, correct?

A. Yes.

Q. And what happened at that point?

A. He brought his small set of plans and he says, this is what it kind of looks like. So then he brought a big set of plans and showed me where -- and I said, that's not

what is shown, somebody had to draw a line between the sand and the stone to show the difference. Just because there is a line there, how are you going to show on a piece of paper that there is any difference between stone and sand, you can't draw the difference. And unless there is an artist that I don't know about, you can't show pebbles of stone or sand, so they had to put a line in there. As of the date that I am setting here, there is just a line, there is no mark in there telling you that it is separated. I told Gene at that time, that ten-foot piece, whatever we did beyond that trench, was going to be a claim.

Q. And this ten-foot piece, or whatever it came out to be, is the location from beyond the edge drain lapping back up underneath the curb, correct?

A. Correct, that piece is in debate.

Q. And that's the piece that Gene Coglin showed you on the large set of plans in September of '95?

A. He tried to indicate to me that is what was shown. But as he said the day of his deposition -- he said what is a paid item was a paid item. This beyond the trench is not a paid item and he didn't know how we were going to get paid for it. I don't know that those are the exact words of his but --

Q. I am sure both of us will check that out.

So the location that's -- that was in dispute

September of '95, and apparently is still in dispute now, is from the outside of the drain lapping back and tucking up underneath the curb?

A. Correct.

Q. And it is your opinion that the plan drawings don't show the fabric extending beyond the drain and lapping and tucking back up underneath the curb?

A. Correct.

Q. When you told Gene Coglin in September of '95 that you were going to have a claim over this item, who else was present?

A. I don't think nobody was present at that meeting. But then there was another meeting that come up with Noel Smith, and also Ralph Langdon, and I -- they told me that they would take care of it at a later date, that they were confused on how it was. If Gene wanted it out there, put it out there for the time being. So that's the way we started.

Q. The conversation that you had with Gene Coglin, that was on the job site?

A. On the job site.

Q. With no one else present?

A. Dennis might have been there and Jim Liptak, you know, them guys were all hanging around Gene. I don't know who was all present at that time. I know John was there.

Q. John Zimmer?

A. John Zimmer.

Q. And then you had a subsequent conversation with Ralph Langdon and Noel Smith?

A. Right.

Q. When was that?

A. I think the next meeting was probably on that Wednesday or something and I brought it up to Noel Smith at that time because we had so much fabric on the job, the fabric supplier give us certain cut rolls which would fit between the trenches. And then after they wanted it all to go completely covered, you know, some of them rolls we had to send back and get different ones because you had too much waste, and they would not pay you for the laps. And that is spelled out in the specification. So we had to get rid of less laps, we had to send some of that narrow stuff back, and so that was one big change. Then this ten-foot piece on the outside edge was a completely different change and we had to cut a roll for that. I think we cut a 20-foot role.

Q. Where did the conversation with you and Ralph Langdon and Noel Smith take place?

A. That was in the trailer -- the first one with Ralph Langdon was right out on the sand grade because I was screaming.

Q. About the fabric?

A. Yep.

Q. And who else was present other than you and Ralph?

A. Oh, there would have probably been five or six laborers and myself, and I don't know if John would have been at the first screaming match or not.

Q. Was Ralph screaming?

A. No, Ralph wasn't screaming until -- later on I hired a guy by the name of John Shanderville, because Ralph was pretty close to -- kind of a friend of mine from early ongoing business, I didn't really want to get too mad at him, and this, that and the other thing, and I wanted to keep a working relationship. So we never got heated. But John and Ralph pretty well wrestled in the trailer one day.

Q. Over the issue of fabric?

A. Issue of fabric and the issue of moving the sewers around.

Q. Who else was present when you had the conversation with both Ralph and Noel Smith?

A. Probably John Zimmer and I think Mike Aek was there which he testified he wasn't, but I think he was .

Q. Was that at one of these weekly meetings?

A. Yes, it was.

Q. And the weekly meetings, Boddy kept the minutes, correct?

A. Correct.

Q. So if we looked in the meeting minutes that Boddy

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kept in September of '95, there should be some reference in there to this conversation that you had with Noel Smith and Ralph Langdon about fabric and additional compensation for that item?

A. I haven't reviewed them records in a long time, I think there is but I ain't going to say today.

Q. Is there or isn't there? Who actually kept the minutes?

A. John Zimmer.

Q. And is it true that you had a tape recorder during these weekly meetings?

A. Yes, it was.

Q. And you recorded the meetings?

A. Yes, we did.

Q. And do you still have those tape recordings?

A. No, we don't.

Q. What happened to them?

A. I think John taped over them.

Q. John Zimmer?

A. Right.

Q. You don't have any of the tapes of any of the meetings from this project?

A. I don't believe so.

Q. Okay. Now the issue of fabric obviously was a pretty important issue to you, you had some screaming matches

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with Ralph, right?

A. Right.

Q. And that would be important enough to keep in the meeting minutes, right?

A. Yes, it was.

Q. And what about the issue of having to remove and replace the temporary aggregate for the driveways, that's another important issue to you?

A. Yes, it is.

Q. And was the issue of additional compensation for that method discussed at the meeting minutes -- or at the meetings?

A. It was discussed several times that they never should have add the quantity of gravel to the item of concrete under pavement -- aggregate under pavement. It should have been said as maintenance gravel. And that's the way it is in the meeting minutes, that the gravel should be added as another paid item called maintenance gravel to go along with the specification of 1990.

Q. Boddy was actually paid for all of the material it placed in the driveways, right?

A. Paid one time.

Q. Okay. Now, the issue of payment again, again that was discussed at the weekly meetings?

A. Yeah, first it got to be a known subject and they

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said they were going to take care of me at a later date.

Q. And who made the statement to you that MDOT would take care of you on a later date for the payment for the removal and replacement of the temporary aggregate?

A. We asked MDOT right at the beginning if work orders would be issued to us on this project and we had to state to them whether we were going to file a claim. And they had so many changes at the beginning. They said they didn't want to issue no work orders, which at the end of the specification they had to do it. So they didn't file the specification and they said I didn't have to file the specification for claim, they said they would take care of it at a later date.

Q. That was all stated at one of these weekly meetings?

A. Yes.

Q. And all of that conversation would be reflected in the minutes?

A. I don't think that -- the way I just said it was a hundred percent the way it is in the weekly minutes.

Q. There should be some reference to MDOT's statement that you didn't have to file a claim?

A. I don't think they called it a claim, they called it no paperwork, they didn't call it a claim. Just like their work orders, they didn't call them work orders, they

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never issued them.

Q. Did anyone from MDOT tell you or anyone else from Boddy that Boddy did not have to file a Notice of Claim in this case?

A. Yes, Gene Coglin -- Ralph Langdon did, Noel Smith told me, and even Jim Hansen after he come aboard for Noel Smith also said it is too far along, we don't have a Notice of Claim.

Q. When Jim Hansen said that, the work had already been completed, correct?

A. No, we were still out there on that project.

Q. Had the work already began on which the claims were based?

A. Yes,

Q. When did Gene tell you or someone else from Boddy that Boddy didn't have to file a Notice of Claim?

A. I think the first one was when we really got into jumping around with the sewers, how were they going to pay us for moving machinery from one end of the job to the other end. But that finally got settled.

Q. Let me ask it this way. Did Gene Coglin or anyone else from MDOT ever tell you or anyone else from Boddy that it did not have to file a Notice of Claim for any of the issues involved in this lawsuit?

A. Yes, they did.

A. I think about a month into the job.
Q. So that would be in '95 obviously but what month were you thinking?
A. I would say September.
Q. Okay. So again, there should be some reflection in the meeting minutes that Boddy kept in September of '95 where Noel Smith told Boddy that a Notice of Claim is not required?
A. If there is meeting minutes down here and saved off this job in the last five years, should be in there. I don't know if there is any meeting minutes that was typed up. This job has been going on for five years, everybody has been into paperwork, everybody has took parts of it and there is -- I think there is still some meeting minutes, I don't know.
Q. The last name that you mentioned from MDOT was Jim Hansen. When did Jim Hansen tell you or anyone else that a Notice of Claim is not required?
A. After a meeting in my office.
Q. I am sorry?
A. After a claims meeting, it was in my office.
Q. After the claims meeting where Jim Hansen was on the panel?
A. I don't think there was a panel there. He was just trying to sell the claim before it went to the first procedure. You got to have a meeting with the resident

engineer and also the district engineer before you can go onto claims.
Q. Okay. When did that occur with Jim Hansen?
A. As he stated in his deposition, two days before he retired.
Q. That's the only meeting that you had with Jim Hansen where he stated a Notice of Claim was not required?
A. I think he said at the first job meeting it has gone too far, this job should have never went -- we should have given you work orders and everything like that. I think he had a meeting with his -- with all of the MDOT employees after that.
Q. And that meeting that you had with Jim Hansen was in his office?
A. No.
Q. I am sorry, where was it?
A. In the trailer.
Q. Oh, on site?
A. On site.
Q. Was anyone else present?
A. I think there were quite a few people there, there were a lot of MDOT people and myself and John Zimmer.
Q. Who else from MDOT was there?
A. Probably Gene, and I think Dennis was in there and Jim was in there. And I don't know if John from -- he

attended a lot of meetings, too, John Rump from Tony Angelo.
Q. Did Boddy keep any minutes of this conversation that took place with Jim Hansen?
A. I don't know for sure.
Q. Did you have your tape recorder running at that point?
A. I think it was supposed to be, whether it was running or not, I can't answer that question. It probably was but I don't know.
Q. And the tape recordings that you kept of these meetings, it would have included these conversations you have just described for me where Gene Coglin, Bob Tiera, Noel Smith and Jim Hansen state that a Notice of Claim is not required?
A. I don't think they came out and said a Notice of Claim was not required, I think they came out and said no notice has to be given and we are going to keep up to you, we are going to keep track of the time and pay you in some way, or in some kind of language like that. I don't think a Notice of Claim as you are saying it ever was really -- came out and say you don't have to file a Notice of Claim, they have always beat around the bush with it.
Q. Did you ask them to clarify it?
A. No, I did not.
Q. Whatever they had said, that would have been

reflected in those tape recordings that you had?
A. Yeah. They always said they were going to take care of me in the end.
Q. So everything they said would have been reflected in those tape recordings, correct?
A. Yes.
Q. Which are no longer around, correct?
A. Not that I know of.
Q. Did you ever tell MDOT that Boddy was going to stop working unless it received something in writing about payment for any of these issues?
A. None of these issues, no.
Q. Did you tell MDOT that Boddy was going to stop working unless it received something in writing on other issues?
A. No, we did not.
Q. And you are saying that you never felt the need to give MDOT a written Notice of Claim at any point in this project up until the lawsuit was filed?
A. They knew I was going to file a claim, that I wasn't happy with geotextile. They knew I wasn't happy with the driveways and so on, the IDR, especially on the geotextile fabric. And I and Ralph sat down time and time again, he said his records can't be my records because the IDRs, it said how many layers were rolled out, geotextile

Q. Dave Batey took the information that you provided to him, correct?
A. Yes.
Q. And maybe some payroll information that either Angie or Carol gave to him?
A. When we did it three different ways on the curb, I was out there to see how many feet they got done by day. I will tell you right now they did 150 feet, it is not only things on a piece of paper, it was 150 feet, and when they did 118 feet we got 200 to 250 feet a day. And if we did more than that, Gene Coglin was up digging it out if we got more than that. He knew what was coming off. It is still in this mind today, we had five people, 150 feet a day, and I can go up and measure 2.2 miles of road.
Q. Other than being in your mind, is there any documentation to support the $338,682 claim for geotextile separator?
A. If I can set down with a piece of paper I can calculate it right out for you.
Q. Without you drafting a new piece of paper, a new document, is there anything right now that will substantiate that amount?
A. I don't believe so.
MR. SCOTT: Wait a minute, time out. For the record, there is a variety of claims that have been

submitted, all of which -- which document all of this. So when you are talking about in addition to those claims,, or are you talking about something separate or what?
MR. BRICKEY: I am talking about this documentation to support the $338,682.
MR. SCOTT: We have been through three meetings, we went to a district and a regional and a COR meeting in which we have given those numbers before, they are not numbers of first impression in the Complaint. So if you are looking for something different, you can answer that question, if you are looking for that number -- or if you are looking for him to regurgitate those numbers, then they have been part of claim files previously filed.
Q. (BY MR. BRICKEY):Mr. Boddy, I think you have told me this $338,682 that you came up with for geotextile separator is based on what is in your head, correct?
A. And it was put in documentation which was given to the state to back up that claim.
Q. Okay. And that documentation listed the number of employees and the number of feet placed per day, right?
A. And a little bit of that is on the IDRs.
Q. As far as the number of feet placed per day, is that based on anything other than what is in your head?
A. No.
Q. Okay.

A. Just the payroll I pay out, it is still in my head.
Q. I am sorry?
A. The amount I paid out to get that geotextile down is in my head yet today or else I wouldn't be here today.
Q. I am not asking what you had to have it placed, I am asking what supports this figure in paragraph 15 of your Complaint?
A. I thought that was pretty well described in the Complaint, that would give you all of the backup in the COR meetings to describe that.
Q. Let's take a look at what I think you are referring to as documentation to support this amount. I believe under issue C of what you submitted to the COR is what you are referring to and maybe you can tell me if I am correct.
A. C is increased cost for installation of geotextile fabric. It talks about the plans, and special provisions on the plans.
Q. Let me show you page C-7, and ask if you drafted that or did you calculate that?
A. I calculated this and give it to one of the girls for typing, the cost of the bond and --
Q. And is this what you are referring to as documentation supporting the claimed amount?

A. Yes.
(Deposition Exhibit No(s) 1 marked for identification.)
Q. (BY MR. BRICKEY): Mr. Boddy, I am showing you what has been marked as Deposition Exhibit Number 1, this is the supporting documentation that we just referred to -- or you just referred to?
A. Yes, it is.
Q. Okay. Is there any other documentation that supports the amount of $338,682?
A. There is a few IDRs out there that shows that we didn't get paid for separator cloth. And Ralph said in the deposition at the COR meeting we didn't get paid for separator cloth, Gene's deposition said we didn't get paid for anything behind the curb, and that's all I have.
Q. Okay. So the figures -- or the figure, the total listed on Exhibit 1, is for payment for the material placed beyond the edge drain?
A. Correct.
Q. Did anyone else contribute to compiling the information on Exhibit 1 other than you?
A. No.
Q. Under labor, you have one foreman and one operator and four laborers. Is that supported by any documentation?
A. Yes, it is. The union labor, it is out of a

STATE OF MICHIGAN

JOHN ENGLER, GOVERNOR

DEPARTMENT OF TRANSPORTATION

18101 WEST 9 MILE ROAD, SOUTHFIELD, MICHIGAN 48075
PHONE: 810-569-3993 FAX NO: 810-569-3103 TDD/TTY - MICHIGAN RELAY CENTER 800-649-3777
ROBERT A. WELKE, DIRECTOR

EXHIBIT D

RECEIVED MAY 21 1997

May 19, 1997

Mr. Horace Boddy, President
Boddy Construction Company, Inc.
200 - 14th Street
P.O. Box 308
Marysville, Michigan 48040

Dear Mr. Boddy:

A District Construction Engineer level meeting to review your claim on Project M 77032-34659A was held on May 6, 1997 at the Boddy Construction office in Marysville.

This project consists of 2.2 miles of reconstruction and widening with reinforced concrete pavement, drainage and intersection improvements on I-94 BL from Range Road northeasterly to its intersection with M-29 in the City of Marysville, St. Clair County.

The following were in attendance:

Horace Boddy	-	Boddy Construction
Ron Boddy	-	" "
David Bade	-	" "
Ralph Langdon	-	Michigan Department of Transportation
Robert Tiura	-	" " " "
Eugene Koglin	-	" " " "
Mary Lou Masko	-	" " " "
Charles Cook	-	" " " "
Jim Hanson	-	" " " "

The meeting was for your claim for increased costs consisting of twelve components as follows:

1. Payment for 6-inch Sewer Taps

2. Increase in Topsoil Required $ 12,960.00 Plus

3. Density Testing Problems	
4. Increased Contractor Staking	$ 9,444.60
5. Pavement Gapping Increase	19,998.61
6. Stage Construction Requirement Station 758+50 to Station 776+50	7,172.05
7. Removal of Temporary Drive Material	37,587.12
8. Excavation Increase NB M-29 Left Turn Lane	
9. Grading beyond six feet behind the curb and gutter	
10. Traffic Control Equipment and labor during Winter Shutdown - 1995-1996	21,304.16 Plus
11. Poured Concrete Box Culvert Removal	47,927.25
12. Geotextile Separator Increased Costs	338,682.00

Each of the twelve items will be presented and analyzed separately.

1. CLAIM FOR 6-INCH SEWER TAPS WHERE UNDERDRAINS ENTERED DRAINAGE STRUCTURES

Contractor:

During the first year of construction the drainage structures were built prior to underdrains being placed. It was necessary to tap into these structures. (The second year sleeves were placed in the structures to accommodate the underdrains). No inlet elevations were given on the plans.

Resident Engineer:

Payment for sewer taps only applies when tapping into existing structures. The underdrains were shown on the plans and tapped into the structures when the drain passed the structure. All drains placed were shown on the plans. The construction method used the second year is normal

(sleeves placed when structures were built). Taps were paid for when additional drains were added in the areas of subgrade undercuts.

Decision:

The drains were properly paid for. This claim is denied.

2. CLAIM FOR INCREASED COST OF TOPSOIL UNDER SOD

Contractor:

Slope restoration was placed under sod. This is contrary to the definition of slope restoration. The plan amount of topsoil was available on site. When quantities tripled, topsoil had to be purchased.

Resident Engineer:

The amount of sod required increased from 300 syds. To 10,000+ syds.

Decision:

The Resident Engineer will negotiate an increased price for the topsoil over the quantity available on site and the required plan quantity.

3. CLAIM FOR ADDITIONAL WORK REQUIRED DUE TO POOR MDOT DENSITY TESTS

Contractor:

At Michigan Avenue there was a problem obtaining density. Boddy Construction hired P.S.I. to check the density. P.S.I. found the density to be higher. The state employees (two students) kept pounding cones for each test. After Willis Stewart (MDOT Density Specialist),. Came to the site, there were no more problems.

Resident Engineer:

Many cones were pounded because the M.D.'s varied from 107 to 115. The material varied.

Moisture percentages varied by two percent. The P.S.I. tests and MDOT tests were close. P.S.I. took five tests. Two of those failed. (All MDOT tests failed). Willis Stewart thought that the consultant's methods were not correct. He talked to the operator and called the P.S.I. office and was not satisfied with the answers. Granular material was placed around drainage structures in lifts deeper than allowed by specifications.

Decision:

The material varied in moisture content (MDOT 4.2 percent to 9.2 percent, P.S.I. 5.4 percent to 11 percent). Two of six P.S.I. tests failed. Willis Stewart felt MDOT methods and equipment were correct. This claim is denied.

4. CLAIM FOR INCREASED CONTRACTOR STAKING

The contractor will submit more information showing what work was done. This will be submitted as a force account.

5. CLAIM FOR AN INCREASE IN THE AMOUNT OF PAVEMENT GAPPING REQUIRED

Contractor:

There was an increase of 1,300 lft. of pavement gapping. Stone was placed to accommodate cross traffic. The contractor was not paid to remove the stone.

Resident Engineer:

The contractor was paid for gapping where "bridges" were used to carry traffic. This amounted to approximately 700 lft. of the gapping quantity.

Result:

Mr. Horace Boddy will research this to determine exactly what this claim entails.

Note: The payment for "Pavement Gapping" includes "...the maintenance of cross traffic". See Page 417 of the Standard Specifications.

6. CLAIM FOR REMOVAL AND REPLACEMENT OF SAND SUBBASE, GEOTEXTILE FABRIC AND AGGREGATE BASE FROM STATION 758+50 TO STATION 776+50

Contractor:

MDOT inspectors required the contractor to construct the clay grade six feet beyond the new (Stage 1) edge of metal during Stage 1. This resulted in the area becoming contaminated and the contractor having to remove the contaminated material.

Resident Engineer:

The contractor was directed to construct the job in agreement with the plans (See typicals Pages 51 and 52). Pages 2, 3 and 4 of the plans have the following statement. "The contractor shall take precautions to avoid disturbance/contamination of the subbase and aggregate base-concrete, modified during stage construction. Any repairs will be at the contractor's expense." The contractor and MDOT agreed that the material became contaminated and needed to be removed.

Decision:

This is a very difficult area to construct. There may not have been a better method than the one utilized. MDOT required nothing more than the contract required. The plan note made contamination the contractor's responsibility. This claim is denied.

7. CLAIM FOR REMOVAL OF TEMPORARY DRIVE MATERIAL

Contractor:

Addendum #1 (which indicated that "aggregate base under concrete" would be used for temporary drives) does not indicate that removal of the material is included in the price of the material. The same material was used several times.

Resident Engineer:

The Addendum indicates that this is the temporary material. Payment should include removal.

Decision:

The Addendum indicates that the material is temporary, but not how the removal will be paid.

The Resident Engineer is directed to reimburse the contractor an additional 25 percent of the unit price of the Aggregate Base for Concrete (9,860 tons) used for drive maintenance. This is to be payment in full for moving the material as often as it was necessary to do so. Payment amount $22,370.00.

8. CLAIM FOR COMPLETING ADDITIONAL EXCAVATION ON THE LEFT TURN LANE FROM NORTHBOUND M-29

Contractor:

Plan Sheet 47 shows a 40-foot dimension from the right edge of metal on Northbound M-29 to the proposed left edge of metal of the turn lane. Scaling this proposed lane on the plans indicates a seven foot wide lane, which the contractor used to bid the excavation in this area which was paid as station grading. The contractor had no right to change this width.

Resident Engineer:

The cross section for the lane indicates a 12-foot width. The right edge of metal of Northbound M-29 varies. If a discrepancy exists, the contractor should have asked MDOT to interpret the plans. No excavation was completed prior to the correction.

Decision:

The 40-foot dimension is not given at any particular station. Since the right edge of metal varies, this dimension could not be used. The typical clearly shows a 12-foot lane width. This dimensioned width takes precedence over the accuracy of scaling off the plans. This claim is denied.

9. CLAIM FOR GRADING BEYOND SIX FEET BEHIND THE CURB AND GUTTER

Contractor:

A note on Page 2 of the plans states "Embankment C.I.P." included in Station Grading". Catch basins were added behind the curb with ditches added to drain the area. Typical cross-sections show work only to six feet behind the curb. In some areas grading was complete and then MDOT changed the plan. These areas were only paid for once.

Resident Engineer:

The typical on Page 2 of the plans shows grading beyond 6 feet back of curb and gutter. This is the mainline general typical. Slope stake lines on the plans indicate grading beyond the 6-foot point. There are some ditches shown on the plans. Page 47 of the Proposal indicates that Station Grading includes:

"1. Moving excavated material longitudinally and/or transversely where necessary or providing additional embankment material to obtain the required cross-section at all locations on this project." This is the work that was done.

Decision:

The mainline typical does show grading beyond the 6-foot behind curb limit. The limits of the station grading pay item on Page 49 of the Proposal is clear. Areas that were staked once and graded once should be paid as Station Grading one time. Any area staked and graded a second time should be paid for a second time.

10. CLAIM FOR SUPPLYING AND MAINTAINING TRAFFIC CONTROL DEVICES THROUGH THE WINTER OF 1995-1996

Contractor:

Job delays prevented Boddy Construction from paving in 1995. Worksafe has submitted a bill for supplying devices through the winter. Boddy Construction will be submitting a cost for picking up barrels every other day.

Resident Engineer:

Every stage of construction required traffic control. If the paving had been completed, driveways and the new edge of metal next to a drop off would have required Type II Barricades. Three, not six, target arrows were used through the winter. If the contractor receives approved Extensions of Time, the traffic items will be increased in accordance with the Standard Specifications.

Decision:

The contractor used no more equipment or manpower than could have been expected during the winter shut down. This claim is denied.

11. CLAIM FOR COMPENSATION FOR REMOVAL OF 3 POURED BOX CULVERTS

Contractor:

This work was not similar to the Masonry and Concrete Removal bid at $30.00/cyd. The price should be $175.00/cyd. more. This was not shown on the plans.

Resident Engineer:

An increase in cost is justified, but not $175.00/cyd. One box culvert with a gas main was paid by Force Account and this amounted to much less than $205.00/cyd.

Result:

Boddy Construction will attempt to justify the requested price of $175.00/cyd.

12. CLAIM FOR INCREASED COSTS FOR GEOTEXTILE SEPARATOR

Contractor:

The geotextile separator is not shown on the plan except between the underdrains. The contractor was directed to place the geotextile separator around the end of the aggregate base for concrete and then fold it back over the aggregate base and up the back of curb with an overlapping piece. Also, there is a big shortage of material. The amount purchased was 177,417 sft., and 105,052 sft. was paid for. The job was bid from a small set of plans.

Resident Engineer:

On a full size set of plans it is clear that the geotextile separator should wrap around the aggregate base for concrete and under the curb and gutter. Plan Sheet 5 of 8 shows the fabric passing the underdrain trench. Page 111 of the Proposal says the geotextile separator shall be measured "... to the limits of the OGDC as shown on the plans". Page 107 of the Proposal states the reason for geo-textile separator is to "...prevent intermixing of dissimilar aggregate or soil layers,..." indicating the necessity to wrap the aggregate base to accomplish this. The claim amount of $338,000.00 is exaggerated. This included work that would have to be done regardless of the placing of geotextile separator and increased work caused by the contractor.

Decision:

The small sized prints did not clearly show the extent of geotextile separator required. Several other areas of the plans and Proposal did indicate the placement clearly and the large set of plans clearly showed the required placement. The contractor was allowed to place the separator in a fashion easier than as per plan. This claim is denied.

Summary of Decisions:

Item 1	Denied
Item 2	Topsoil cost to be negotiated
Item 3	Denied
Item 4	Contractor to submit more information
Item 5	Contractor to clarify claim
Item 6	Denied
Item 7	Approved $22,370.00
Item 8	Denied
Item 9	Areas graded twice are to be paid twice
Item 10	Denied
Item 11	Contractor to submit more information
Item 12	Denied

Court of Appeals, State of Michigan

ORDER

Boddy Construction Co Inc v Michigan Dep't of Transportation

Docket No. 237471

LC No. 00-017592-CM

David H. Sawyer
Presiding Judge

Kathleen Jansen

Pat M. Donofrio
Judges

The Court orders that the motion for rehearing is DENIED.

Presiding Judge

STATE OF MICHIGAN
COURT OF APPEALS

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

APR 18 2003
Date

Sandra Schultz Mengel
Chief Clerk

1990
STANDARD
SPECIFICATIONS
for
CONSTRUCTION

MICHIGAN
DEPARTMENT OF TRANSPORTATION

tor's directions or while suspended by the inspector will be considered unauthorized and may have to be removed and replaced at the Contractor's expense in accordance with Subsection 1.05.11. In no instance shall any action or omission on the part of the Inspector relieve the Contractor of the responsibility of completing the work in accordance with the plans and specifications.

Any approvals, reviews, and inspections of any nature by the Department, its officers, agents, and employees, shall not be construed as a warranty or assumption of liability on the part of the Department. It is expressly understood and agreed that any such approvals are for the sole and exclusive purposes of the Department, which is acting in a governmental capacity under this contract. Any approvals, reviews, and inspections by the Department will not relieve the Contractor of the Contractor's obligations hereunder, nor are such approvals, reviews, and inspections by the Department to be construed as a warranty as to the propriety of the Contractor's performance, but are undertaken for the sole use and information of the Department.

1.05.10 Inspection.—The Engineer and authorized representatives shall be allowed access to all parts of the work at all times and shall be furnished such information and assistance by the Contractor as may be required to make a complete and detailed inspection. Such inspection may include mill, plant, or shop inspection of materials and workmanship.

Any approvals, reviews, and inspections of any nature by the Department, its officers, agents, and employees, shall not be construed as a warranty or assumption of liability on the part of the Department. It is expressly understood and agreed that any such approvals are for the sole and exclusive purposes of the Department, which is acting in a governmental capacity under this contract. Any approvals, reviews, and inspections by the Department will not relieve the Contractor of the Contractor's obligations hereunder, nor are such approvals, reviews, and inspections by the Department to be construed as a warranty as to the propriety of the Contractor's performance, but are undertaken for the sole use and information of the Department.

Scales, weighing equipment, and other associated devices may be inspected and checked at any time by the Department. Claims by the Contractor for delays or inconvenience due to these operations will not be considered. The Department Scale Inspector will conduct the inspection and checks so as to cause as little interference as possible with the Contractor's operations.

The initial inspection of the Contractor's truck scales or plant scales by the Department Scale Inspector will be made without charge by the Department. If the scales fail to operate within the tolerances prescribed, repairs or adjustment, as necessary, shall be made by the Contractor and the scales will be checked again, provided the repair or adjustment is completed within approximately 3 hours of the completion of the initial inspection.

Should the scale or scales not be set up and ready for inspection, on the date scheduled for the initial inspection, or the repairs or adjustments at the initial inspection are of such magnitude as to require the Department Scale Inspector to return to the site of the scale, the Contractor will be charged $200.00 for each re-inspection made by the Department Scale Inspector.

The Contractor shall provide such necessary equipment and personnel as may be required to facilitate these inspections.

The above requirements for scale inspection will apply to each project or scale installation that requires inspection by the Department Scale Inspector.

1.05.11 Removal of Defective and Unauthorized Work.—Work done without lines and grades being given, work done beyond the lines shown on the plans or as given, work done without required inspection, except as herein provided, or any extra work done without authority may be considered as unauthorized. Work so done may be ordered removed or replaced at the Contractor's expense.

All work which has been rejected or condemned shall be remedied or removed and replaced by the Contractor at the Contractor's expense in a manner acceptable to the Engineer.

1.05.12 Disputed Claims for Extra Compensation.—If any inconsistency, omission, or conflict is discovered in the contract or if in any place the meaning of the contract is obscure, or uncertain, or in dispute, the Engineer will decide as to the true intent.

a. Notice of Claim.—If the Contractor intends to seek extra compensation for any reason not specifically covered elsewhere in the contract, the Contractor shall notify the Engineer in writing of the Contractor's intention to make claim for such extra compensation before beginning work on which the Contractor intends to base a claim or the Contractor shall notify the Engineer within 24 hours after the commencement of the delay, suspension of work, loss of efficiency, loss of productivity or similar event on which the claim will be based. If the Contractor intends to file a claim based upon the denial of a extension of time request for any reason not specifically covered elsewhere in the contract, the Contractor shall notify the Engineer in writing within 7 days after the Department mails to the Contractor the denial of the Contractor's request for such extension of time. Neither the refusal of the Contractor to sign a written recommendation or work order nor the Contractor's signing a recommendation or work order under protest shall constitute the notice required herein. Failure of the Contractor to give such notification or to afford the Engineer proper facilities for keeping strict account of actual cost of the work or delay upon which the notice of intent to file claim was made will constitute a waiver of the claim for such extra compensation or extension of contract time unless such claims are substantiated by Department records and the extra costs were unforeseeable.

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May 29, 2003

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VIA FEDERAL EXPRESS

Clerk of the Court
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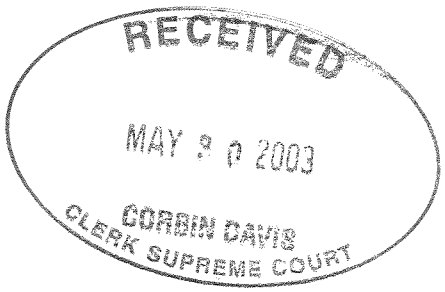

Re: Boddy Construction Company, Inc., v MDOT
Court of Appeals No. 237471
Court of Claims No. 00-17592-CM
Our File No. 6956/6

Dear Clerk:

Please find enclosed an original and eight (8) copies of Plaintiff/Appellee's Response in Opposition to the Defendant/Appellant's Application for Leave to Appeal with Proof of Service in the above-captioned matter.

Please file in your normal manner and return a "true" copy in the self-addressed stamped envelope enclosed. Please call should have any questions and/or concerns.

Very truly yours,

Robert Davis

Robert Charles Davis

RCD/mb
Enclosures

David D. Brickey, Esq.
Lawrence M. Scott, Esq.

J:\Boddy Construction Co\0006 MDOT\Appeal\Correspondence\Clerk of the Supreme Court 1.doc